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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 176

ALICE MASTEN SPENCER, as Administratrix, etc.,
Appellant,

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees.

ALICE MASTEN SPENCER, et al.,
Appellants,

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees.

MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased,
Appellant

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees

Motion to Dismiss

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Motion to Dismiss

Appellees move to dismiss the appeals from the District Court of Appeal of the State of California, First Appellate District, in each of the three cases, on each of the grounds stated in this Court's Rule 16(1)(b), as follows:

1. The alleged federal questions sought to be reviewed were not timely or properly raised or expressly passed on.
2. The judgments rest on an adequate non-federal basis; and
3. The appeals do not present a substantial federal question.

STATEMENT OF THE CASE

Appellants concede (Juris. State. 15) that the facts are stated correctly in the opinion below, and we therefore cite it for statements of fact.[1]

Over 100 years ago, in 1859, a San Francisco bank, "Hibernia Savings & Loan Society" (hereafter called "Hibernia of 1859"), was formed as a corporation with capital stock under a California Act of 1853 (App. 5). Its by-laws provided that depositors should pay a $2.00 "entrance fee" and sign the by-laws and would then be "styled" "members", and that "members" who acquired stock would also be stockholders (App. 5).

In 1862 California enacted a statute permitting a banking business to be carried on by membership corporations. An Act of 1864 then authorized existing banking corporations to reincorporate under the Act of 1862 (App. 7).

August 29, 1864, a membership corporation was incorporated under these Acts of 1862 and 1864, named "The Hibernia Savings and Loan Society". Pursuant to the authority of the Act of 1862 it immediately adopted a by-law defining how one became and ceased to be a member. This by-law provided that the only way one could become a member was by election of the Board of Directors, except that all persons who were members of the old bank, "Hibernia of 1859", on the day the new bank was formed, "shall be deemed and considered members of this corporation, and the signatures of such persons to an agreement on their part to become members of this corporation" should be procured (App. 8). Eighty-three years later, in 1947, this new bank was legally converted into a stock corporation, and its stock was issued to those recognized as its members (App. 9). Its name was then changed to "The Hibernia Bank". It is the appellee of that name, and we refer to it hereafter as "Hibernia of 1864" or simply as "Hibernia".

1. As a copy of the opinion is attached to appellant's Jurisdictional Statement as an appendix, references to the opinion are to pages of that appendix.

Nine years later, in 1956, appellants brought these suits in the State Court in San Francisco seeking a declaration that they were part owners of the bank. Appellant in the *Mel* case claimed by descent from one John Mel, who died in 1892. Appellants in both the *Spencer* cases claimed by descent from one N. K. Masten, who died in 1901.

Mel and Masten had each become depositors of "Hibernia of 1859" in 1859 with a deposit of $5.00. Mel was never a stockholder, and he ceased forever to be a depositor in 1861, three years before Hibernia was formed (App. 7). Masten owned one share of stock for a while but surrendered it for cash in 1861. He too ceased forever to be a depositor before Hibernia was formed in 1864. Neither Mel nor Masten was ever elected a member of Hibernia or ever had anything to do with it (App. 8).

Two main questions were argued below:

1. Did appellants' ancestors, Mel and Masten, ever become members of "Hibernia of 1864" at all?

2. If they did, did any rights pertaining to that membership descend to appellants; i.e., construing the statutes under which it was created, was a membership in "Hibernia of 1864" of a descendible kind?

The court below answered both questions against appellants and rendered judgment against them on motion for summary judgment. The judgment was affirmed by the District Court of Appeal, and the California Supreme Court denied a petition for a hearing. Appellants seek review here.

QUESTIONS PRESENTED

None of the questions stated in the Notice of Appeal (3, 4) is present.[2]

2. In the Jurisdictional Statement (14) appellants add another question, about dormant accounts. The case involves no dormant account. The accounts were closed out 100 years ago.

Appellants seek to present (1) a substantive question (a) under the 14th Amendment and (b) under the impairment of the obligation of contracts clause of the Constitution, Art. I, Sec. 10, and (2) a point of summary judgment procedure under the 14th Amendment. But in no court below did appellants ever assert that a state statute was repugnant to the federal constitution. Therefore no appeal to this Court lies. *Charleston Ass'n v. Alderson*, 324 U.S. 182, 185. Even treating the appeal as a petition for certiorari, it is improper, as we now show, first as to the substantive question and then as to the procedural.

DISCUSSION

I. The Substantive Question.

A. IT WAS NOT TIMELY OR PROPERLY RAISED.

Appellants never, in any way, referred to any substantive contention under the 14th Amendment or to Article I, Sec. 10, either in the court of first instance or in the court below until, after the latter's decision, they did so cursorily in a petition for rehearing and in a later petition for hearing by the State Supreme Court. But under California procedure contentions may not be first raised in either of these ways. *Smith v. Crocker First Nat. Bank*, 152 C.A. 2d 832, 836, 314 P.2d 237; *Flores v. Stone*, 21 Cal. App. 105, 111, 131 Pac. 348. And this Court has held that it is not timely to raise a federal question so late. *Herndon v. Georgia*, 295 U.S. 441, 443; *American Surety Company v. Baldwin*, 287 U.S. 156, 163-164; *El Paso & Southwestern R. Co. v. Eichel & Weikel*, 226 U.S. 590, 598.

To escape this principle appellants assert that "the issue of constitutionality * * * was raised by the opinion of the District Court of Appeal itself" (Juris. State. 17). This assertion is not so. The sole basis assigned for it is merely that the opinion denied that Hibernia's first by-laws were unauthorized, retroactive, or invalid. But this simply answered appellants' arguments. This is

not a case where a "surprise" decision of a court first raises a constitutional issue, like *Missouri v. Gehner*, 281 U.S. 313 or *Great Northern R. v. Sunburst Co.*, 287 U.S. 358, which appellants cite. Here the issue of alleged retroactivity and of its legal effect had been raised *but only as a question of state law*. And it was answered only as a question of state law. Such an issue raises no federal question. *American Surety Co. v. Balduin*, 287 U.S. 156. As said in *Gibbes v. Zimmerman*, 290 U.S. 326, 328, referring to a contention of impairment of the obligation of contracts under Article I, Section 10,

> "We cannot consider this contention, since in his pleading the appellant relied solely on the provisions of the state constitution with respect to the obligation of contracts, and made no reference to § 10, of Article 1 of the Federal Constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section."

B. MOREOVER, THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

Appellants' case failed *either*

1. If the ancestors never became members of "Hibernia of 1864," or,

2. If, assuming that they did, a membership was not descendible.

Appellants' present assertion of constitutional rights is addressed solely to the second issue; they claim that the by-laws of "Hibernia of 1864" cut off descendibility and that the California Acts of 1862 and 1864 violated the 14th Amendment and Article I, Section 10 of the Constitution by empowering Hibernia by its by-laws to destroy "pre-existing property and contractual rights."

While the court treated the issue of descendibility of membership in "Hibernia of 1864", it did so because the issue had to be decided in other cases concurrently argued (see footnote, p. 8, infra), and the court used its opinion in the instant case as the

main opinion in the whole group (See *Burke v. Hibernia Bank*, 186 A.C.A. 806, 813, 9 Cal. Rptr. 890, 895; *Bennett v. Hibernia Bank*, 186 A.C.A. 815, 821, 9 Cal. Rptr. 896, 900; *Jacob v. Hibernia Bank*, 186 A.C.A. 822, 826, 9 Cal. Rptr. 901, 905) *But the court independently decided that Mel and Masten had never become members of "Hibernia of 1864" at all* (App. 21-34)

The Supreme Court of California had previously settled that no person became a member of "Hibernia of 1864", if not elected, except those who were members of "Hibernia of 1859" on the day the new bank was formed, *Bennett v. The Hibernia Bank* (1956), 47 C.2d 540, 305 P.2d 20. A crucial question, then, was whether the ancestors were members of "Hibernia of 1859" at that time (App. 21). The California Act of 1853, under which "Hibernia of 1859" had been formed, authorized a banking business to be done only by stock corporations and not by membership corporations, *People v. Perrin* (1880), 56 Cal. 345, 347. "Hibernia of 1859" was formed with stockholders, and Mel and Masten were not stockholders. In order to avoid the conclusion that they therefore had no property rights in "Hibernia of 1859" appellants argued that "Hibernia of 1859" was in reality not a stock corporation but an old style mutual savings bank (App. 21) in which the depositors are the members who own it. But it is elementary that when one ceases to be a depositor in a mutual he ceases to be a member and has no property interest whatever. Not only does this principle prevail throughout the United States and has been stated by this Court in *Society for Savings v. Bowers*, 349 U.S. 143,[3] but the issue is the nature of "Hibernia of 1859".

3. This Court there said (p. 150):

"The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest."

a California corporation which existed between 1859 and 1864. As appellants conceded in their petition to the California Supreme Court, that question was one of interpretation of the charter and by-laws of the 1859 corporation. This was peculiarly a California question, and the court below answered it by saying that under the charter and by-laws of "Hiberma of 1859", when Mel and Masten became members of *that* corporation, they acquired no rights that survived the closing of their accounts in that bank, and not being a member of the old bank on the day the new was formed, and never having been elected a member of the new, neither ever became a member of it. Consequently, he was deprived of no rights by the Acts of 1862 and 1864 or by the by-laws of the new corporation, *because he then had no rights of which to be deprived*. No federal constitutional question is involved.

Appellants assert that a decision of a state court interpreting a contract as not giving a party a claimed property or contract right is itself a federal question. But the principle of the case appellants cite (*Louisiana Railway & Navigation Company v. New Orleans*, 238 U.S. 164) is that where a state court gives effect to later legislation which would operate to impair the obligation of a contract if it exists, this Court has jurisdiction to determine whether the contract was made or was invalid or has become inoperative (p. 170). Where the decision does not give effect to a later act and is merely an interpretation of the contract under laws in effect when it was made, no constitutional question is raised. *Long Vault Development Co. v. Call*, 242 U.S. 272 at 277. Here the decision was that under the charter, by-laws, and California law in effect at the time "Hiberma of 1859" was formed, one becoming a member thereof acquired no rights and entered no contract giving him rights which survived the closing of his account. With that decision appellants were foreclosed without reaching the Acts of 1862 and 1864.

C. IN ANY EVENT THE FEDERAL QUESTION SOUGHT TO BE PRESENTED IS NOT SUBSTANTIAL.

No federal issue is involved, even if the ancestors had become members of Hibernia on its formation in 1864. In *Gentry v. Hibernia Bank*, 23 Fed. Rules Serv. 23a.53, Case 2 (1956), the United States District Court for the Northern District of California disposed of a group of cases asserting claims similar to appellants' with this statement, equally applicable here:

> "* * * The cases are peculiarly local, involving the construction of California statutes.
>
> "Without more, under these circumstances, it is sufficient to say that we are busy enough with legitimate federal causes, not to be bothered with local litigation, artfully, but not very successfully, dressed up in federal habiliments."[4]

1. Under the Fourteenth Amendment.

The contention that the Acts of 1862 and 1864 violated the 14th Amendment founders on the fact that the 14th Amendment was not adopted until 1868.

2. Under Article I, Section 10.

The contention concerning impairment of the obligation of contracts vanishes with the question of what contract rights the ancestors had. The acts of 1862 and 1864 impaired no rights in "Hibernia of 1864" because "Hibernia of 1864" was created under those acts, the only way one could become a member of it was pursuant to them, and the attributes of such a membership could be no more than they prescribed. What they prescribed is a California question.

Appellants therefore argue that the contract rights allegedly impaired were not rights in "Hibernia of 1864" but rights in

4. The *Gentry* group refiled in the state court, which rendered judgments for appellees similar to that here. No appeal was taken in some of the group; others were appealed to the court below, which heard them and decided them together with the present case, and no review by this Court has been sought.

Hiberma of 1859 , i e , that the creation of Hiberma in 1864 to supersede the prior corporation and the prescription that membership in Hiberma was non-descendible impaired rights theretofore existing But this simply begs the question of the nature of a 'membership' in Hiberma of 1859 under its charter and by-laws That too is a California question and the court below held that such a membership was itself personal and not descendible As the court said (App 45)

> Appellants' contention that the by-laws unlawfully attempted to sever retroactively the right of descendibility which inured in that membership poses the underlying question of whether the original 1859 membership actually encompassed descendibility, whether such a right existed in the first instance

And it answered (App 55)

> the severance of descendibility did not retroactively forfeit any right of Mel or Masten since the nature of Hiberma of 1859 and the 1859 by-laws disclose that that institution conceived of a selected and nondescendible membership

And again (App 48)

> If transferability did not inhere in membership of Hiberma of 1859, the by-laws of 1864 did no more than make express that which was implied, and they did not operate retroactively at all

Furthermore, appellants themselves assert the 1864 incorporation was undertaken pursuant to the members [of Hiberma of 1859] authorization and certain acts of the Legislature (App 20) The Second Amended Complaint alleged that the members of Hiberma of 1859 authorized its trustees to incorporate Hiberma under the Acts of 1862 and 1864 This not only was a consent that the new corporation supersede the old, but it was an authorization to the trustees to form the kind of corporation

wherein the directors would have all of the powers conferred upon directors by those acts, including the power to adopt the by-law specifying how and when membership should terminate. Consequently, the members of "Hibernia of 1859" themselves authorized the by-law prescribing that a membership was strictly personal.

II. The Procedural Contention.

Appellants' procedural contention is that "due process" was denied by not allowing "cross-examination". This is a highly imaginative characterization of what occurred. The judgment of the court of first instance was rendered on motion for summary judgment. Appellees called no witness to the stand. What appellants did was to subpoena an officer of Hibernia to bring to the hearing of the motion *all* of its records for 100 years and then seek to call him to the witness stand, in person, and through him to offer, *en masse*, this vast volume of records without pointing to any document as being relevant to any issue. It was this procedure, and nothing more, that the court declined to permit (App. 17-20).

A. THE PROCEDURAL QUESTION WAS NOT TIMELY OR PROPERLY RAISED.

Appellants do not contend that they raised this contention in the trial court at all or until the last page of their third brief in the court below.[5] Under California practice "a question smuggled into a closing brief merits scant consideration", *Faus v. Pacific Electric Ry. Co.*, 146 C.A. 2d 370, 379; 303 P.2d 814, 821. Moreover, this constitutional contention was then *abandoned*, for appellants did not make it in their subsequent petition to the California Supreme Court for hearing; the procedural argument in that petition rested solely on alleged principles of state law. This

5 "Appellants' Reply to the Respondent's Supplemental Brief"

Court has said that it does not review questions which the litigant does not first tender to the highest state court. *Missouri v. Gehner*, 281 U.S. 313, 320.

B. MOREOVER, THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

Appellants complaint is that they were not allowed to introduce or inquire about certain documents. But, as the opinion below shows, the only point on which the documents were supposed to bear was the question whether some memberships in "Hibernia of 1861" had been allowed to descend (App. 15-20). But that question is irrelevant to the basis on which the court independently placed its decision, namely, that Mel and Masten never became members of Hibernia at all.

C. IN ANY EVENT THE PROCEDURAL FEDERAL QUESTION SOUGHT TO BE PRESENTED IS NOT SUBSTANTIAL.

The California summary judgment procedure, Cal. Code Civ. Proc. Sec. 437(c), is similar to the federal summary judgment procedure stated in F.R.C.P. Rule 56 and extended on April 17, 1961 to admiralty causes by this Court's new Admiralty Rule 58. Motions for summary judgment are decided on the pleadings, admissions, depositions and affidavits. There is no provision for a trial or for oral testimony of witnesses in court. The court below upheld the ruling of the court of first instance on two grounds. First, it is "contrary to normal procedure" to call witnesses to the stand on the hearing of a motion for summary judgment (App. 18). Second, California procedure does not permit the offer of bales of documents *en masse* (App. 19-20). California practice permits extensive discovery procedure, inspection, interrogatories and utmost scope in depositions (Cal. Code of Civil Proc. Sec. 2016-2035). The record shows that appellants propounded and received answers to interrogatories and *stipulated* that they had all the inspection they wanted. Had they desired,

they could have pursued the inquiry through depositions. The effect of the liberal discovery and summary judgment procedures of modern practice is to rationalize litigation by requiring spadework to be done out of court, instead of clogging the calendar by having it done at trial. This Court long ago held that "the due process clause does not guarantee * * * any particular form or method of * * * procedure", and, particularly, does not require that one be permitted to subpoena witnesses to testify instead of relegating him to depositions. *Hurwitz v. North*, 271 U.S. 40, 42; *Iowa Central Railway v. Iowa*, 160 U.S. 389.

CONCLUSION

It is respectfully submitted that the appeals should be dismissed.

Dated: San Francisco, California, July 7, 1961.

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